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No. 97-2072

In The

Supreme Court of the United States

October Term, 1997

TURBOMECA, S.A. and TURBOMECA ENGINE CORPORATION,

Petitioners,

v.

KYONG JU BARNETT, Individually, and as Next Friend of JESSE MORGAN BARNETT, and MIA KYONG BARNETT, Minor Children; WANDA and JAMES S. BARNETT, SR; and STATE OF MISSOURI,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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2. IS CERTIORARI WARRANTED TO REVIEW A STATE COURT DECISION WHICH CORRECTLY APPLIED THE SETTLED STANDARDS OF *BMW V. GORE* TO THE FACTS OF THIS CASE AND WHICH FURTHER UNDERTOOK AN INDEPENDENT REVIEW OF THE REASONABLENESS OF THE PUNITIVE DAMAGE AWARD ACCORDING TO MORE STRINGENT STATE LAW STANDARDS?

3. IS CERTIORARI WARRANTED TO DECIDE WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO PUNITIVE DAMAGES IN CIVIL CASES WHEN NO FEDERAL OR STATE COURT HAS EVER CONSIDERED THE ISSUE AND WHEN EXCESSIVE FINES ANALYSIS WOULD ONLY DUPLICATE THE DUE PROCESS ANALYSIS THOROUGHLY PERFORMED BY THE COURT BELOW?

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STATEMENT OF THE CASE

On May 27, 1993, James Barnett, Jr. was the pilot in command of Life Flight 2, an air ambulance helicopter service operated jointly by St. Luke's and St. Joseph Hospitals in Kansas City, Missouri (Tr. 844-46). He and a crew of two nurses were responding to a call for a hospital transfer in Bethany, Missouri. Upon arrival at the hospital, the patient was loaded onto the helicopter and the helicopter departed for St. Luke's Hospital in Kansas City (Tr. 850-51). Mr. Barnett did not know that his life-saving mission would result in two deaths, his own and that of the patient. He did not know that his helicopter contained a defective part which caused the fatal crash.

Petitioner Turbomeca, S.A.[1] is a helicopter engine manufacturer based in Tarnos, France. Petitioner Turbomeca Engine Corporation is its corporate affiliate that exclusively distributes Turbomeca engines in the United States. Since 1985, petitioners were on notice that the engine part that caused the death of Mr. Barnett and the patient in his helicopter was dangerous and defective. During the 8 years preceding the crash, petitioners deliberately withheld from aviation authorities and users of their helicopter engine warnings as to the danger they knew existed and offers to replace the defective parts. The evidence clearly established that petitioners failed to warn or replace parts because they knew that replacement would cost them in excess of $48 million and they

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[1] Petitioners have incorrectly named both corporate defendants. As set out in the opinion by the Missouri Court of Appeals the legal name for Turbomeca, S.A. (which is the A/K/A) is La Société Anonyme Turbomeca Francé. Further, the distributor is not Turbomeca Engine Company, but Turbomeca Engine Corporation (Pet. A-1). Except where separately identified, both petitioners will be referred to hereinafter as Turbomeca.

were willing to risk public health and safety to save that expense.

The Missouri Court of Appeals, in a unanimous opinion of its 11 members sitting en banc,[2] accurately summarized the evidence offered at trial as follows:

> The reprehensibility of Turbomeca's conduct is *unparalleled*, considering that Turbomeca knew the TU-76 was defective and had discussed incidents resulting from the TU-76's failure internally, but did not find it necessary to either: inform the helicopter owners of the in-flight failures, notify the FAA of such incidents, or conduct a recall of the defective TU-76 part. From the evidence it can easily be inferred that Turbomeca's decision-making was motivated solely by economics.

Pet. App. A-41 (emphasis added). The court thoroughly set forth the pertinent facts in its opinion at Pet. App. A-1-15 and A-30-50.

The deceased's wife of 15 years, his 14- and 12-year-old children, and his parents brought this action against Turbomeca. Following a four-week trial, the jury entered a verdict of $175 million in punitive damages in addition to compensatory damages. The trial judge ordered a remittitur of all but $25 million of the compensatory damages and of one-half or $87.5 million of the punitive damages. The Missouri Court of Appeals further remitted compensatory damages to $3.5 million and punitive damages to $26.5 million. Petitioners' application for review to the Missouri Supreme Court was denied.

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[2] Judges on the Missouri Court of Appeals are selected by means of a non-partisan merit commission system known as the "Missouri Plan."

SUMMARY OF REASONS FOR DENYING THE WRIT

The petition suffers from a fatal jurisdictional defect. In exchange for payment of the final judgment in this case, and before filing their petition in this Court, petitioners demanded and received an unconditional release and satisfaction of judgment from respondents. Under Missouri law, this concludes the litigation between the parties and precludes any further judicial action. Petitioners have recognized the finality of this release and satisfaction of judgment by claiming the punitive sums paid in this case as a credit in a companion case now on appeal to the Supreme Court of Missouri. Thus, there is no live case or controversy to support this Court's jurisdiction under 28 U.S.C. 1257(a).

Although the jurisdictional issue is technically primary, the virtual certainty of a jurisdictional defect in this case is just one more reason why this Court should deny a petition that fails on its own merits. The court below upheld a remitted punitive damage award in this case after thoroughly applying the due process standards this Court recently announced in *BMW of North America v. Gore*, 116 S.Ct. 1589 (1996), as well as conducting an independent review under the more stringent Missouri law standards. Petitioners allege no split among lower courts concerning the *BMW v. Gore* standards, nor indeed any erroneous interpretation of those standards by the court below.

Petitioners' claim that this case should still provide the occasion for further elaboration of punitive damages rests on false or misleading statements of law and fact. Petitioners had full advance notice that their persistent intentional and reckless conduct, resulting in the death of two people, could subject them to punitive damages under Missouri law. The punitive award in this case related solely to that conduct, not to conduct in other

jurisdictions. In reviewing that award, the court below fully and correctly considered petitioners' financial condition and the cumulative effect of an award in a companion case.

There is no reason for this Court to consider a novel extension of the Excessive Fines Clause to this case when no lower court has considered this issue and when an Excessive Fines Clause analysis would merely duplicate the due process analysis thoroughly performed by the court below.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION IN THAT PETITIONERS VOLUNTARILY PAID THE FINAL JUDGMENT IN FULL WITHOUT ANY RESERVATION OF RIGHTS AND IN EXCHANGE FOR RESPONDENTS' COMPLETE RELEASE AND DISCHARGE OF ALL CLAIMS WHICH EXTINGUISHED THE UNDERLYING CAUSE OF ACTION.

This Court lacks jurisdiction to entertain the petition for writ of certiorari because there is no longer any case or controversy between the parties. This is so because petitioners voluntarily paid the entire amount of the punitive judgment in this case without reservation of any rights or remedies and demanded and received a complete release from respondents. The "Acknowledgments of Satisfaction of Judgment and Waivers of Attorneys' Liens" expressly provide that "[D]efendants' tender of payment *shall forever release and discharge defendants from any further obligations in this case.*" Resp. App. 1, 6 (emphasis added). These are general releases which constitute a full accord and satisfaction under Missouri law.

The general release of a defendant without any reservation of rights concludes the litigation for all purposes

and precludes further judicial action. *Lugena v. Hanna*, 420 S.W.2d 335, 341 (Mo. banc. 1967); *Farmer v. Arnold*, 371 S.W.2d 265, 269-70 (Mo. banc. 1963). In the words of the Missouri Supreme Court:

> In the absence of words in the operative part of a general release which indicate an intention to limit or restrict its effect, *it must be concluded that the instrument was contemplated and intended to be a complete settlement of all matters between the parties to the release.*

Lugena v. Hanna, 420 S.W.2d at 341 (emphasis added). This release thoroughly extinguishes any jurisdiction in this Court.

The release documents were drafted by petitioners and make express reference to Mo. Rev. Stat. § 511.570. That statute provides that "[w]hen any judgment or decree is satisfied *otherwise than by execution*," the prevailing party shall enter an acknowledgment of satisfaction. Petitioners' claims of a threat of execution notwithstanding, it is beyond dispute that the monies were voluntarily tendered because no process of execution was ever initiated and the judgment was satisfied, per the statute, "otherwise than by execution."

There was absolutely nothing about this final hearing or the documents executed therein which would indicate that this was anything other than the final resolution of the case. Based upon the transcript of final judgment proceedings, it was abundantly clear that petitioners and respondents were present to obtain and the court below decreed a *"final closure on this matter."* Transcript of Proceedings of Entry of Final Judgment, April 28, 1998, Resp. App. 23 (emphasis added) (hereinafter "Transcript of Final Judgment Proceedings"). Petitioners expressly approved the terms of the final judgment as ordered by the trial court:

> MR. O'DEAR (attorney for petitioners): Judge, on behalf of the Turbomeca defendants, we do acknowledge that this final judgment is in order, which is consistent with the court's rulings on these various matters.

Resp. App. 14. Indeed, petitioners expressly sought the release and discharge agreements by respondents as a condition to their payment of the judgment:

> MR. O'DEAR: Your Honor, at this time we would ask that Mr. Robb and his clients sign the acknowledgments of satisfaction of judgments, which we have provided to them.
>
> MR. ROBB: We agree to do so, Your Honor.
>
> Your Honor, we have now signed and executed and are in the process of notarizing the acknowledgments . . .
>
> MR. O'DEAR: We acknowledge receipt of this document. Resp. App. 18.

These proceedings established unequivocally the consensual nature of the payment in exchange for respondents' complete release of petitioners and its acceptance by all as the final accord and satisfaction of the litigation. At this hearing rendering final judgment and release of all claims, petitioners never stated that they were paying the judgment involuntarily so as to avoid further payment of post-judgment interest or under duress to avoid execution on the appeal bond, as they now claim to this Court. Pet. 8. Any threat of execution on an appeal bond (which the respondents had a legal right to demand and the court had full authority to order) is certainly not the kind of "duress" that would render payment on a judgment involuntary especially where that appeal bond had already been in place for almost three years. It is not "duress" to threaten to do what one has a legal right to do. *Gustin v. F.D.I.C.*, 835 F. Supp. 503, 508 (W.D. Mo. 1993) (applying Missouri law).

To the contrary, petitioners *voluntarily* paid the judgment with the intent that respondents "forever release and discharge" them. Petitioners on their own included the "release and discharge" language in the acknowledgment of satisfaction of judgment documents:

> MR. WILLIAMS (counsel for co-respondents Wanda and James Barnett, Sr.): Your Honor, if I may, I take it the defendants have approved the form and content of the satisfaction of judgment since you supplied it to us, is that correct?
>
> MR. O'DEAR (attorney for petitioners): Oh, yes. Yes. Resp. App. 18.

It is well-settled law not only here but also in Missouri that voluntary payment of a judgment amounts to accord and satisfaction and extinguishes the right to appeal that judgment.[3] *Thorp v. Bonnifield*, 177 U.S. 15,

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[3] Petitioners' cited case of *Rosenblum v. Jacks Or Better of America West, Inc.*, 745 S.W.2d 754 (Mo. App. 1988), squarely supports respondents' position in holding that *"voluntary payment of a judgment precludes appeal of that judgment."* *Id.* at 763 (emphasis added). There was no "threat of execution" as stated by petitioners as the judgment in that case was not even fully satisfied. Instead, the court noted that "documents appended to appellants' brief clearly reflect that payment of the judgment was made in lieu of posting a supersedeas bond or submitting to execution, and not voluntarily, in a sense that payment was made so as to end the matter." *Id.* at 764. Petitioners in the case at bar already had a bond posted and payment was clearly made to "end the matter" as they took an unrestricted general release from respondents.

Petitioners cite *Cahill v. New York, N.H. & H.R. Co.*, 351 U.S. 183 (1956) for the proposition that payment of a judgment does not necessarily render a case moot. Pet. 8 at n.6. However, in that case, "[p]etitioner was informed that respondent intended to pursue its remedies notwithstanding payment of the judgment," 351 U.S., at 183, a fact upon which the Court specifically relied. *Id.* Also, the Court specifically noted that the

18-19 (1900); *Little v. Bowers*, 134 U.S. 547, 556 (1890); *Leonard v. Pioneer Finance Co.*, 568 S.W.2d 937, 943-44 (Mo. App. 1978) (defendant who makes voluntary payment of judgment "is barred from appealing that judgment"); *Noah v. German Insurance Company*, 78 Mo. App. 370, 373-74 (1898) (payment of final judgment estops both parties from further litigating the case). This is especially so where the general release, discharge, tender of funds, and acknowledgment of satisfaction were all expressly approved by the court. Indeed, the court approved immediate release of the funds to respondents. Resp. App. 21-22. Strong considerations of comity and finality weigh in favor of according preclusive effect to the general release and discharge, as interpreted under Missouri law.

Moreover, petitioners *induced and invited* respondents to negotiate the tendered checks promptly and to make use of the funds immediately:

> MR. O'DEAR (counsel for petitioners): I would like to say too for the record, I am presuming everybody is going to go to the bank this afternoon. *There shouldn't be any reason why anybody doesn't have the money by this afternoon.*
>
> MR. ROBB: *On behalf of our client, that's our intention,* Your Honor.

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district court denied an application for a stay of execution. Here, petitioners did not reserve any further rights, did not advise respondents of their intention to appeal to the U.S. Supreme Court, and never requested a stay of execution which surely would have been granted given the existence of an adequate appeal bond in the amount of $134 million.

Petitioners' citation of *United States ex rel. H & S Indus., Inc. v. F.D. Rich Co.*, 515 F.2d 760 (7th Cir. 1975), is similarly misplaced because in that case *both* parties "contemplated appealing, and did in fact appeal." *Id.* at 765.

Resp. App. 22-23 (emphasis added). *Both* petitioners and respondents clearly demonstrated an intention and expectation that the funds would be put to immediate use by the respondents. Respondents' acceptance and beneficial use of the judgment monies is based not only on the final judgment of the Missouri court following exhaustion of all appeals, but also on the petitioners' explicit promise that respondents would "have the money by this afternoon." The release and discharge constitutes a contract – to wit, one expressly approved by the court – and petitioners' actions in inducing actual reliance by respondents as to the beneficial use of the monies is a classic instance of estoppel. *Missouri Highway and Transportation Comm. v. Myers*, 785 S.W.2d 70, 73 (Mo. banc. 1990).

Both petitioners and respondents have accepted the finality of the judgment by acting in significant reliance upon the release and final judgment. Petitioners have claimed the benefit of the release by applying for a credit under Missouri law for the $26.5 million paid in punitive damages in *Barnett* in the companion case of *Letz v. Turbomeca, S.A.* pending before the Missouri Supreme Court, Case No. 80558 (Subst. Brf., p. 92).[4] Petitioners cannot accept the advantages of this judgment in the companion case while at the same time seeking to appeal from it.

This Court has long recognized the "acceptance of benefits doctrine" which provides that a party who accepts the benefits of a judgment is precluded from appealing that judgment. *Embry v. Palmer*, 107 U.S. 3, 18-19 (1883); *see also Winfield Inns v. Edward Leroux Group, Inc.*, 896 F.2d 483, 488-89 (11th Cir. 1990) ("acceptance of

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[4] Mo. Rev. Stat. § 510.263.4 provides a credit for "amounts previously paid by the defendant for punitive damages arising out of the same conduct."

benefits" doctrine provides that "a party who voluntarily and knowingly accepts the benefits of a judgment or decree cannot seek a reversal of the judgment or decree on appeal"). Petitioners have liquidated the respondents' actions in the case at bar precisely so they could claim a credit under the Missouri statute in the companion case. Their treatment of this case as fully and finally satisfied renders moot any further appellate action and renders this Court without jurisdiction to hear this writ.

Respondents have detrimentally relied on the final judgment and petitioners' representations in several respects. Respondents have incurred substantial tax liabilities and other fees and expenses incurred with acceptance of the final judgment in full reliance on petitioners' representations. Resp. App. 1, 6. In further reliance, as part of the final judgment and with the full knowledge and consent of petitioners, respondents extinguished and paid the claims of the State of Missouri for one-half of the net punitive judgment, a sum of $4,742,199.[5] Pet. App. 40. Petitioners have no recourse under Missouri law for recovery of these funds in that they were tendered and paid for pursuant to the court order with full and lawful consideration, i.e., release and discharge of all claims against petitioners.

Accordingly, the full payment of the judgment and the general release executed as between petitioners and respondents in the lower court effectively extinguish any jurisdiction of this Court. As the Court lacks jurisdiction under 28 U.S.C. § 1257, the petition should be denied.

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[5] Indeed, petitioners *directly* tendered the payment of $4,742,199 to the State of Missouri "in full and final satisfaction of any interest the State has or may have in this matter." Resp. App. 21.

II. ONCE PETITIONERS' MISSTATEMENTS OF MISSOURI LAW AND OF FACT ARE CORRECTED, THIS CASE PROVIDES NO REASON TO ELABORATE FURTHER DUE PROCESS CLAUSE LIMITATIONS ON PUNITIVE DAMAGE AWARDS.

Petitioners do not claim that the court below articulated an interpretation of the standards announced by this Court in *BMW v. Gore*, 116 S.Ct. 1589 (1996), that conflicts with the interpretation of any other federal or state court. Nor do petitioners claim that the court below articulated an interpretation of the *BMW* standards that conflicts with any particular language in *BMW* itself.

Rather, petitioners' only claim is that the *BMW v. Gore* standards are themselves insufficient to the extent that they allow a punitive damage award to stand on petitioners' slanted version of the law and facts of this case. Petitioners do not propose any particular elaboration of those standards that they think would be helpful and warranted. Instead, they merely suggest that this Court, with no help from petitioners, might want to provide "[s]ome further guidance," Pet. at 14, and "explain when enough is enough." *Id.* at 16.

Most importantly, however, many of petitioners' statements about Missouri law and the facts of this case are patently erroneous or misleading. Contrary to petitioners' misstatements, Missouri law has provided clear notice for over a century that punitive damages are available in a wrongful death action; the punitive damages liability imposed on petitioners related solely to the deaths their actions caused in Missouri, not to extraterritorial damage as petitioners claim here; the lower court's treatment of petitioners' financial status was fully in accord with this Court's guidelines and did not conflict with other lower court treatments; and in determining the

appropriateness of the punitive damage award to respondents, the court below fully considered the cumulative effect of that award and the award of punitive damages in *Letz v. Turbomeca Engine Corp. et al.*, the other wrongful death action arising from the same accident that killed Mr. Barnett.

Once Missouri law and the facts are set straight, it is clear that this case provides no reason for this Court to provide any further elaboration on *BMW v. Gore*, given the complete absence of lower court conflict or alleged error in application, and despite petitioners' vague calls for clarification.

It is highly significant that petitioners present no issue here as to the due process adequacy of Missouri's *procedural* safeguards on punitive damage awards. Petitioners have never in this case challenged any of Missouri's procedural safeguards as violating due process, as so found by the Missouri Court of Appeals:

> Because Turbomeca does not argue on appeal that Missouri's standards and controls are so inadequate as to violate due process, this issue is outside the scope of this opinion.

Pet. App. A-38 n.12. Indeed, Missouri's procedural safeguards on excessive punitive awards substantially exceed what this Court has determined to be minimal due process. These protections include bifurcation of the compensatory and punitive findings, clear instructions to the jury patterned after *Haslip* as to the function of punitive damages "to punish and deter defendants," inadmissibility of defendants' financial data until finding of punitive liability, trial and appellate court authority to remit punitive awards, and more. Mo. Rev. Stat. § 510.263. Each and every one of the foregoing safeguards was requested by and afforded petitioners in this case.

Given the propriety of the Missouri procedures on assessment of punitive damages, respondents respectfully submit that the remitted punitive judgment therefore "is entitled to a strong presumption of validity" as pronounced by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993); *see also BMW v. Gore*, 116 S.Ct. at 1604 (Breyer, J., concurring). Petitioners' sole mission is to re-argue the evidence and to engage this Court in a factbound determination of the reasonableness of the final punitive judgment in this case. Therein lies no claim to the review process of this Court.

A. The Missouri Appellate Court Properly Followed The Due Process Guidelines Set Forth In *BMW v. Gore* As Well As The More Stringent Missouri Law Standards.

The Missouri Court of Appeals, in its unanimous (11-0) opinion, not only reviewed the punitive damage award to assure that it complied with this Court's decision in *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996), but also to assure that the amount met the additional strict standards of Missouri law. *See* Pet. App. A-39-50. The court gave extended consideration to each of the three *BMW v. Gore* factors. First, it examined the reprehensibility of petitioners' conduct and, after a detailed analysis, concluded that:

> [G]iven the testimony of Turbomeca's own officers, it is not difficult to understand why a large punitive damage amount was awarded. *Turbomeca's conduct was unquestionably reprehensible.*"

Pet. App. A-47 (emphasis added).

Second, the Court of Appeals examined the ratio of compensatory and punitive damages and observed that "[t]he trial court's remittitur of $87.5 million in punitive damages, and to $25 million in compensatory damages

exhibits a ratio of just over 3:1," and "the trial court's remittitur evinces a 'reasonable relationship' between actual and punitive damages given the nature of Turbomeca's conduct." Pet. App. A-47 (citing *BMW*, 116 S.Ct. at 1601).

Third, the Court of Appeals examined how the punitive damage award compared to penalties authorized or imposed in comparable cases and concluded that the punitive damage award "was the only real way to deter the conduct of Turbomeca" which based its decisions solely on economics and in complete disregard to whether persons would be injured or killed.[6] Pet. App. A-48.

After considering the factors enunciated by this Court in *BMW v. Gore* as relevant to federal due process

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[6] Petitioners' highest corporate executives admitted that the reason they did not inform world-wide operators or civil aviation authorities of their defective engine part was to save the cost of recall and to not disturb sales (Nichols 56-57; Meliet 162-64). A recall and retrofit of the defective helicopter engine part would have been solely at petitioners' cost and in 1991 that cost would have been in excess of $48 million (Nichols 61-62, Tr. 1151, 1112-13). According to the Missouri court:

> The company always seemed to be motivated by cutting costs, saving money and increasing sales – all at the expense of the unlucky owners. The TU 76 was modified to save money. The new and replacement parts took longer to implement for some customers than to build the entire original engine because of "being blocked" by its commercial sales department. Its laissez faire attitude of never notifying, even post-*Letz* and *Barnett*, owners of the lethal, undetectable dangers inherent in the modified TU 76, along with its net worth and financial ability justifies the imposition here of substantial punitive damages.

Pet. A-49.

analysis, the Court of Appeals went on to fully examine eight additional factors that further constrain punitive damage awards under Missouri law, including "(1) the degree of malice or outrageousness of the defendant's conduct; (2) aggravating and mitigating circumstances; (3) the defendant's financial status; (4) the character of both parties; (5) the injury suffered; (6) the defendant's standing or intelligence; (7) the age of the injured party; and (8) the relationship between the two parties." Pet. App. A-48. In the end, the Court of Appeals further remitted the punitive award to $26.5 million and concluded that that sum was reasonable in that it was necessary and sufficient to punish petitioners. *Id.* at A-47-50.

Thus, unlike the Alabama courts in *BMW v. Gore*, the lower courts in this case did not apply standards that were "vague and open-ended to the point where they risk[ed] arbitrary results." *BMW v. Gore*, 116 S.Ct. at 1605 (Breyer, J., concurring). Rather, they diligently applied the standards that this Court formulated in *BMW*, as well as the additional Missouri safeguards. Because the *BMW* Court understandably declined to "draw a bright line marking the limits of a constitutionally acceptable punitive damages award," *BMW v. Gore*, 116 S.Ct. at 1604, the lower courts here did all that they could possibly do to protect petitioners' due process rights.

B. Missouri Law Has Provided Clear Notice For Decades That Punitive Damages Are Available In Wrongful Death Cases.

Petitioners' claim that Missouri law did not adequately notify them of their potential liability for punitive damages is ludicrous. The statutory language authorizing the award of punitive damages in this case – a provision specifying that, in determining an award of damages that

are fair and just in a wrongful death case, "[t]he mitigating and aggravating circumstances attending the death may be considered" – has remained unchanged since 1855, 138 years before petitioners' conduct caused Mr. Barnett's death. *See* Mo. Rev. Stat. § 537.090 (1994) (current provision); Mo. Rev. Stat. Ch. 51, § 4 (1855) (allowing for a jury to award "damages as they may deem fair and just, . . . and, also, having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default").

Petitioners' chief grievance seems to be that this provision does not contain the specific term "punitive damages." Yet since at least 1883, 110 years before Mr. Barnett's death, the Missouri Supreme Court has made clear that when "aggravating circumstances" are present, "fair and just damages" may include exemplary or punitive damages. *See Nichols v. Winfrey*, 79 Mo. 544, 552 (1883) ("[I]f the circumstances are of an aggravating character, the jury [is] not held to the mere pecuniary injury, but may give punitive damages"). Missouri courts have never wavered in this interpretation over the intervening period of more than a century. *See, e.g., Parsons v. Missouri Pac. Ry. Co.*, 6 S.W. 464, 468 (Mo. 1888); *Goode v. Central Coal & Coke Co.*, 151 S.W. 508, 511 (Mo. App. 1912) (holding that the words "mitigating or aggravating circumstances" found in the wrongful death statute "are intended to apply only to cases in which it would be proper to allow punitive damages").

In light of the unbroken 110-year line of Missouri precedent interpreting the Missouri wrongful death statute to authorize punitive damage awards, there is not the slightest truth to petitioners' assertion that a "diligen[t] examin[ation of] Missouri statutory and case law" would leave it with "no conceivable reason to think" that it

could face punitive damages.[7] Pet. 10-11. Thus, the Court of Appeals was fully justified in concluding that "it could not reasonably be said that Turbomeca did not have adequate 'notice' of the severity of the sanction that might befall them as a result of their conduct. The aforementioned testimony reveals this fact." Pet. App. 48.

Petitioners artfully insinuate that the Missouri Supreme Court's decision in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995), issued two years after the accident that gave rise to this action, was the first to hold that the "aggravating circumstances" language authorized punitive damage awards. Pet. 9-10.

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[7] Petitioners also intimate that they did not have proper notice of the particular *amount* of punitive damages that might be assessed against them, since no previous award of punitive damages in Missouri had been as large. Pet. 10. The criterion for punitive damage awards implied in this objection – that no award can ever be larger than the largest previous award in the state – is obviously ridiculous and has no basis in this Court's precedent. In *BMW of North America*, this Court held that three factors were relevant to determining whether a defendant had "adequate notice of the magnitude of the sanction that [the state] might impose" for violating state law: "the degree of reprehensibility" of the conduct; "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award"; and "the difference between [the award] and the civil penalties authorized or imposed in comparable cases." *BMW of North America*, 116 S.Ct. at 1598. To the extent that any of these factors involve comparison with previous awards in the same jurisdiction, they require comparison, not of raw amounts of awards, but of the degrees of reprehensibility, disparities from harm or potential harm, and relation to civil penalties in previous cases. Because petitioners make no attempt to go beyond the raw numbers in previous cases, their citation of those cases sheds no light on the issue whether they had adequate notice of the severity of punitive damages to which their egregious conduct might expose them.

In fact, however, *Bennett* expanded defendants' rights in Missouri wrongful death actions, rather than expanding a defendant's liability for punitive damages.

In *Bennett*, a wrongful death *plaintiff* argued that a jury's award of damages for "aggravating circumstances" did not always amount to punitive damages and, therefore, did not always have to pass the same exacting review as a punitive damage award. The *Bennett* court rejected this contention, concluding that defendants should receive the benefit of punitive damage procedures and review whenever a jury based a damage award on "aggravating circumstances." *Bennett*, 896 S.W.2d at 466.

Importantly, *Bennett* afforded Missouri wrongful death defendants not only due process review under federal law, but also additional protection under state law. Petitioners omitted mention of these protections in their petition, notwithstanding the fact that they deliberately chose to avail themselves of those protections in the lower courts. Section 510.263 (1) of Missouri Revised Statutes (1994), provides that "[a]ll actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party." In this case, petitioners invoked the protection of this bifurcation provision. In doing so, they obtained the benefit of a companion provision, which provides that "[e]vidence of defendant's financial condition shall not be admissible in the first stage of such trial unless admissible for a proper purpose other than the amount of the punitive damages." Mo. Rev. Stat. § 510.263 (2) (1994).

Thus, petitioners took full advantage of *Bennett* to protect themselves against any prejudice that might arise from admission of evidence of the defendant's financial condition when liability and compensatory damages are litigated, even though it has never been held that such protections are required by due process. It is therefore

particularly ironic that petitioners now misleadingly portray *Bennett* as the first case that could have notified them that their conduct might subject them to punitive damages liability.

C. The Punitive Liability Imposed Upon Petitioners Was Related Solely To The Deaths That Occurred In Missouri.

Petitioners contend that the punitive damage award in this case was based in part on their conduct with regard to other helicopter engines in other jurisdictions, seeking to gain protection under this Court's pronouncement that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."[8] *BMW of North America v. Gore*, 116 S.Ct. at 1597. Although no State countenances the deliberate marketing of dangerous machines, no effort was made in this case to punish petitioners for conduct, whether lawful or unlawful, in other jurisdictions.

The proof was directed at showing that petitioners' failure to warn the deceased and to replace a part that

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[8] Unlike the petitioner in *BMW of North America*, petitioners here have made no attempt to show that their conduct was indeed lawful in other states or countries. They thus ask this Court to elaborate on its holding in *BMW of North America* without knowing whether petitioners' conduct was lawful in some other jurisdiction, as in *BMW of North America* itself, or unlawful, thus raising a question that *BMW of North America* expressly reserved. *See BMW of North America*, 116 S.Ct. at 1598 n. 20 ("Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasors' unlawful conduct in another State."). This void in the record leaves this Court without the means of deciding whether the question is even present on the facts of this case.

they knew was defective was not only intentional, but also was the result of a deliberate process in which petitioners decided to save $48 million rather than inform the users of their product that their lives were in danger. This use of "evidence describing out-of-state transactions" is precisely the use that the Supreme Court has deemed "relevant to the determination of the degree of reprehensibility of the defendant's conduct," *BMW v. Gore*, 116 S.Ct. at 1598 n. 21, and therefore perfectly admissible and consistent with due process. *Id.* at 1599-1600; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 n. 28 (1993).

Thus, respondents introduced considerable evidence at trial that the helicopter engine part that caused the death in this case had failed again and again both outside the United States and inside the United States. The number of incidents putting petitioners on notice of the danger that persisted as a result of their failure to warn or replace the defective part is set out thoroughly by the Missouri Court of Appeals. *See* Pet. App. A-7-15.

Both the jury instructions at trial and the Court of Appeals' analysis on appeal are plainly directed at the use of "other incidents" evidence deemed relevant and constitutionally permissible in *BMW v. Gore*. The trial judge in this case instructed the jury that, to award punitive or exemplary damages, it had to find that petitioners' actions "showed a complete indifference to or a conscious disregard for the safety of others." *See* Pet. App. A-17. In reviewing the punitive damage award, the Court of Appeals specifically held that "the amount of the punitive damage award must somehow be related to the wrongful act and the actual or potential injury resulting therefrom." *See* Pet. App. A-37. Thus, it is clear that the jury was asked to examine petitioners' conduct as it related to the facts of this case, and the Missouri Court of

Appeals examined the punitive damage award in light of the wrongful act in this case and the actual or potential injury at stake in this case.

Petitioners were free to argue to the jury, if they chose, that they did not foresee that their helicopter would crash in Missouri or would cause death in Missouri, and that they only foresaw that the defective part they left in their machines was threat to the rest of the world. They made no such argument because it would have been absurd. The question was whether petitioners deliberately put the deceased at risk of death and whether they did so reprehensibly. Given the evidence in this case, the jury reasonably decided to impose constitutionally permissible punitive damages.

Petitioners' claim of extraterritorial punishment is not only baseless, but it also has not been preserved for review in this Court. The evidence in this case clearly established that there were 2,850 helicopters of the type at issue in this case operating worldwide and that one-third of these were in use in the United States. *See* Pet. App. A-42. Petitioners had a full opportunity to offer evidence, if they chose, on the locations of these helicopters, since they sold and maintained them. They offered no such evidence. Nor did they make any argument in the lower courts that the award amounted to punishment for conduct in other states.[9] "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Petitioners make no attempt to explain why this case justifies

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[9] In their motions for remittitur, both petitioners failed to preserve any claim whatsoever that the punitive award was excessive under federal Due Process because of "extraterritorial punishment." (L.F. 692-700). They made only a passing reference to such a claim in their alternative motion for new trial, which is not at issue on their petition.

the extraordinary step of entertaining a question they failed to raise in the Missouri courts below.

D. The Missouri Appellate Court Properly Considered Evidence Of Financial Condition On The Amount Of Damages Needed To Punish And Deter Petitioners' Unlawful Conduct And Petitioners' Argument About Net Worth Is Incomplete As Well As Misleading.

Petitioners argue that the punitive damage award in this case violates due process because it is large in relation to petitioners' respective net worths. Petitioners' claim that the remitted punitive judgment represents 750% of Turbomeca Engine Corporations' net worth. *See* Pet. 13. This claim must be completely disregarded because there was absolutely no evidence offered or admitted at trial as to the net worth or any other financial condition of Turbomeca Engine, the wholly-owned Texas subsidiary. Turbomeca so admitted on the record:

> MR. GHERTNER (trial counsel for Turbomeca): Your Honor, there was no proof of net worth with respect to Turbomeca Engine Corporation.

(Tr. 2788). Thus, respondents have never had any opportunity to analyze or contest the figure petitioners now allege in their petition, nor to consider the appropriateness of isolating Turbomeca Engine's net worth in light of the corporate relationship between the two companies.

On this point, the Missouri Court of Appeals found that Turbomeca Engine Corporation was a wholly-owned subsidiary of Turbomeca, S.A. *See* Pet. App. A-2. Petitioners represent to this Court that they are both indirect subsidiaries of Labinal, S.A., a French corporation. *See* Pet. 1. Notwithstanding their formal corporate relationship, the Chief Executive Officer of Turbomeca, S.A., Jean Bernard Cocheteux, testified that it exercised control and

direction over Turbomeca Engine Corporation. Cocheteux 10. Given Turbomeca Engine Corporation's complete lack of independence from Turbomeca, S.A., it is inappropriate to isolate Turbomeca Engine's net worth – whatever it actually is – for purposes of punitive damage analysis. Thus, petitioners' proffered net worth for Turbomeca Engine Corporation provides a particularly bad factual basis for any inquiry this Court might desire to conduct on the relevance of the net worth/punitive damage award ratio to due process limitations.

Petitioners' repeated claim that the remitted punitive award represents "22% of TSA's net worth" is false and misleading as demonstrated by the record below. Petitioners misconstrue the financial data, and, otherwise, claim poverty with respect to the French parent corporation, Turbomeca, S.A. Respondents introduced extensive evidence at trial of the complete financial condition of TSA (Tr. 2769-2772). Turbomeca, S.A.'s total combined sales for the two years preceding the crash were in excess of $973 million (Tr. 2769-70). The remitted punitive award represents less than 2.7% of this total. Turbomeca, S.A. also had on hand over $710 million in assets (Tr. 2770) of which the remitted punitive award represents 3.7%. In discussing that evidence, the Missouri Court of Appeals pointed out that Turbomeca's *"net worth and financial condition justifies the imposition here of substantial punitive damages."* Pet. App. 49 (emphasis added).

Petitioners' repeated argument that the remitted punitive award would be "financially ruinous" is absurd given that the judgment already has been paid in full, Turbomeca continues as a thriving world-wide business, and payment was made pursuant to a $1 billion insurance policy where the carriers expressly agreed to cover all punitive damages (Tr. 3202-29). At a post-verdict hearing,

petitioners boasted to the trial judge that they had applicable and sufficient insurance coverage applying to all TU 76 incidents in the United States and world-wide in the total amount of $1 billion and that punitive damages would be covered (Tr. 3265-69).

Under this Court's formulation in *BMW v. Gore*, the ultimate test of a punitive damages award is whether it is " 'grossly excessive' " in relation to "the State's legitimate interests in punishment and deterrence." *BMW*, 116 S.Ct. at 1595. Whether a particular award of punitive damages will properly punish a defendant's unlawful conduct, and deter it from future misconduct, necessarily depends in part on the defendant's financial condition; an award that ruins an impoverished defendant may neither chasten nor reform a defendant who has profited handsomely from its wrongdoing. Thus, this Court has held that "the 'financial position' of the defendant" is one of the factors properly considered in determining the validity of a punitive damages award. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

The court below properly considered the net worth of petitioner Turbomeca, S.A. as part of its inquiry into that company's "financial position." The evidence introduced in this case, but conspicuously omitted from the petition, illustrates exactly why no court has or should consider a net worth figure conclusive of a business organization's financial position. The jury had before it conflicting evidence of Turbomeca, S.A.'s net worth – petitioners' self-serving reports suggesting a figure of $122,565,470, and respondents' evidence showing a net worth almost 75% larger. While the petitioners' failure to mention the larger figure shows their willingness to engage in distortion in their petition in this Court, the disparity between the two figures shows why net worth will never provide a simple, complete picture of a business organization's financial

position. Valuation of the assets and liabilities of an ongoing business is never an easy matter, and interested parties can produce widely varying yet nonfalsifiable valuations.

In view of the other relevant information the Missouri appellate court had about petitioners' financial position – information omitted from petitioners' discussion here but fully considered below – it is not hard to understand why the lower court found the punitive damage award as ultimately remitted to be reasonable. Once one recognizes the folly of petitioners' implicit suggestion that their contested net worth figure be given some talismanic significance in a due process inquiry, it becomes apparent that the facts in this case do not provide any reason for this Court to elaborate on the factor of the defendant's "financial position," which is as it stands a perfectly sufficient component of the due process analysis.[10]

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[10] Petitioners hint that the lower court's approval of the punitive award in this case places it in conflict with the Eighth Circuit's decision in *Equal Employment Opportunity Comm'n v. HBE Corp.*, 135 F.3d 543, 557 (8th Cir. 1998), which they describe as holding that "a punitive assessment of five percent of the defendant's net worth is *per se* excessive." Pet. 13. In fact, the court in *HBE Corp.*, applying Missouri law on remittiturs rather than federal due process law, made no such holding, but merely concluded that upon consideration of all of the factors deemed relevant under Missouri law, including "the nature and extent of the misconduct, the impact on the individual plaintiffs, a reasonable relation between the compensatory and punitive damages, and an amount sufficient to punish and deter under all the circumstances," *id.*, a remittitur was warranted. Thus, *HBE Corp.* creates no conflict of federal law, and, indeed, no conflict at all.

E. The Missouri Appellate Court Thoroughly Considered the Cumulative Impact Of A Separate Punitive Award In A Companion Case Arising From The Same Incident

Petitioners also argue that the Court of Appeals imposed an unfair "cumulative punishment" by upholding an identical punitive damage award in a companion case arising out of the same incident. Pet. 14-16. However, the Court of Appeals carefully considered this issue and applied existing Missouri law which holds that " '[i]t is a desideratum of the statute that a defendant not be required to pay redundant punitive damages based on the same conduct.' " Pet. App. A-52 (quoting *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 231 (Mo. App. 1988)). The statute that the court refers to is Mo. Rev. Stat. § 510.263.4 (1994), which provides for a credit of amounts previously paid by the defendant for punitive damages arising out of the same conduct.

Applying this principle of Missouri law to both this case and its companion, the Court of Appeals concluded that:

> [T]he remitted amounts of punitive damages in *each* case, when combined, reach the proper result and supply the relief that the credit statute envisions and the United States Supreme Court has enunciated: that total punitive damages, where there are successive suits, will not go beyond due process limits on punishment and deterrence.

Pet. App. A-53 (emphasis in original).

Thus, the Missouri Court of Appeals carefully examined the total sum of the punitive awards in the two cases and applied both the Due Process analysis of *BMW* as well as the additional protections afforded by Missouri statutory and case law in upholding the remitted award in this case.

III. THERE IS NO REASON TO CONSIDER A NOVEL APPLICATION OF THE EXCESSIVE FINES CLAUSE TO PUNITIVE DAMAGES IN CIVIL CASES WHEN NO OTHER FEDERAL OR STATE COURT HAS CONSIDERED THE ISSUE AND WHEN EXCESSIVE FINES ANALYSIS WOULD ONLY DUPLICATE THE DUE PROCESS ANALYSIS THOROUGHLY PERFORMED BY THE COURT BELOW.

Petitioners issue another vague and open-ended invitation to this Court to "address the Eighth Amendment implications of the State's participation" in the punitive damages awarded to respondents. Pet. 19. Petitioners do not identify a single case that has ever decided whether the Excessive Fines Clause, U.S. Const. amend. VIII, limits a state's share in punitive damage awards in private litigation. More important, petitioners concede that the court below did not address the issue. Pet. 17-19. Thus, petitioners ask this Court to venture into completely uncharted territory.

There is no good reason for this Court to take the extraordinary step of addressing the Excessive Fines Clause issue without the benefit of consideration by any lower court. Petitioners hang their request on the thin thread of a reservation in this Court's ruling in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989), that the Excessive Fines Clause does *not* generally apply to "awards of punitive damages in cases between private parties." The *Browning-Ferris Industries* Court noted that its ruling was circumscribed by the facts of the case before it, in which "the government neither ha[d] prosecuted the action nor ha[d] any right to receive a share of the damages awarded." *Id.* at 264. Petitioners seize on the second half of this limiting language, and contend that the facts of this case afford this Court an opportunity to address the application of the Excessive

Fines Clause when the state does have a "right to receive a share of the damages awarded."[11]

However important this reserved issue might have been immediately after the decision in *Browning-Ferris Industries* – and the absence of a single citation in petitioner's petition to a lower court decision on the issue casts serious doubt even on its initial importance – that importance has vanished since this Court's landmark ruling in *BMW v. Gore*, 116 S.Ct. 1589 (1996), that *all* punitive damage awards are subject to scrutiny for excessiveness under the Due Process Clause. It is no longer in doubt, as it would have been immediately after *Browning-Ferris Industries*, that the size of the punitive damage award in this case is subject to federal constitutional limitations. The court below thoroughly reviewed the award in this case in light of the standards announced by this Court in *BMW*, as well as eight additional standards under Missouri law. *See* Pet. App. A-36-48.

Petitioners nowhere suggest that a court's analysis of a punitive damage award under the Excessive Fines Clause would be the slightest bit different than the Due

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[11] Petitioners do not claim that the state was involved in any way in the prosecution of this action, and indeed it was not; the state's participation in the punitive damage award comes solely by virtue of a general law providing that "[f]ifty percent of any final judgment awarding punitive damages after the deduction of attorneys' fees and expenses shall be deemed entered in favor of the State of Missouri." Mo. Rev. Stat. § 537.675.2 (1994). Under this law, the State is not a party to the trial proceedings. It did not appear or participate in the trial. The jury that awarded punitive damages did not purport to award anything to the State. Thus, the amount of punitive damages awarded by the jury was unaffected by the fact that, after punitive damages are awarded in Missouri, a portion may go to the State.

Process Clause analysis announced in *BMW* and painstakingly implemented by the court below. To the contrary, there is good reason to think that the two analyses would be duplicative. In *United States v. Bajakajian*, 118 S.Ct. 2028, 2036 (1998), this Court announced that a punitive forfeiture would "violat[e] the Excessive Fines Clause if it [were] grossly disproportional to the gravity of the defendant's offense."

Under the Due Process Clause analysis in *BMW*, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of a defendant's conduct." *BMW*, 116 S.Ct. at 1599. The *BMW* Court noted with approval a formulation even more strikingly similar to the Excessive Fines Clause standard this Court recently announced in *Bajakajian*, noting that both the plurality and the dissent in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), "placed special emphasis on the principle that punitive damages may not be 'grossly out of proportion to the severity of the offense.' " *BMW of North America*, 116 S.Ct. at 1599 (quoting *TXO Productions Corp.*, 509 U.S. at 453 (plurality opinion); *id.* at 482 (O'Connor, J, dissenting)).

In sum, petitioners ask this Court to take the extraordinary step of extending the Excessive Fines Clause to reach punitive damage awards in civil cases and elaborating the proper Excessive Fines analysis in that context before any lower court has considered the issue, yet they do not suggest how such a novel analysis would add anything to the Due Process analysis thoroughly applied by the court below in this case. There is no good reason to accept such an invitation, and every reason to decline it.

CONCLUSION

Petitioners' voluntary payment and simultaneous execution of an unrestricted general release extinguishes any jurisdiction in this Court. Both petitioners and respondents have relied upon the release in subsequent actions.

The merits of the writ provide no basis for review in that petitioners can cite to no conflict among the lower courts on any important issue of federal law, and the lower Missouri court properly applied *BMW v. Gore* in substantially remitting the punitive award. The petition for certiorari should be denied.

Respectfully submitted,

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Counsel of Record

July 23, 1998

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

KYONG JU BARNETT, et al., PLAINTIFFS v. LA SOCIÉTÉ ANONYME TURBOMECA FRANCÉ A/K/A TURBOMECA, S.A., et al., DEFENDANTS.	CASE NO.: CV93-24644 DIVISON: 8

ACKNOWLEDGEMENT OF SATISFACTION OF JUDGMENT AND WAIVER OF ATTORNEY'S LIENS

(Filed April 28, 1998)

Plaintiffs, Kyong Ju Barnett and Jessie Barnett, their attorneys of record, and each of them, pursuant to Supreme Court Rule 74.11, RSMo 511.570 and RSMo 537.675, do hereby acknowledge that the final money judgment entered in their favor against the defendants herein on April 28, 1998, in this matter has been fully and finally satisfied and that no further action in this case is required of defendants for any purpose. Defendants' tender of payment shall forever release and discharge defendants from any further obligations in this case except payment of court costs as determined in the ordinary course by the office of the Clerk of the Circuit Court of Jackson County, Missouri. Said plaintiffs and their respective attorneys further state that any and all liens for attorney fees and expenses be and hereby are expressly waived in this matter.

APPROVED AND ACKNOWLEDGED:

Dated: 4-28-98 /s/ Kyong Ju Barnett
Kyong Ju Barnett

Dated: 4-28-98 /s/ Jessie Barnett
Jessie Barnett

Dated: 4/28/98 /s/ Gary C. Robb
Gary C. Robb for himself and on behalf of Robb & Robb LLC

Dated: 4-28-98 /s/ Anita Porte Robb
Anita Porte Robb for herself and on behalf of Robb & Robb LLC

ATTORNEYS FOR PLAINTIFFS KYONG JU BARNETT and JESSIE MORGAN BARNETT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Kyong Ju Barnett, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Jessie M. Barnett, to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that he has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Gary C. Robb, to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that he has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Anita P. Robb, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

KYONG JU BARNETT, et al., PLAINTIFFS v. LA SOCIÉTÉ ANONYME TURBOMECA FRANCÉ A/K/A TURBOMECA, S.A., et al., DEFENDANTS.	CASE NO.: CV93-24644 DIVISION: 8

ACKNOWLEDGEMENT OF SATISFACTION OF JUDGMENT AND WAIVER OF ATTORNEY'S LIENS

(Filed April 28, 1998)

Plaintiff Mia Kyong Barnett, a minor, by and through her guardian ad litem, next friend and duly appointed co-conservator, Kyong Ju Barnett, her attorneys of record, and each of them, pursuant to Supreme Court Rule 74.11, RSMo 511.570 and RSMo 537.675, do hereby acknowledge that the final money judgment entered in their favor against the defendants herein on April 28, 1998, in this matter has been fully and finally satisfied and that no further action in this case is required of defendants for any purpose. Defendants' tender of payment shall forever release and discharge defendants from any further obligations in this case except payment of court costs as determined in the ordinary course by the office of the Clerk of the Circuit Court of Jackson County, Missouri. Said plaintiffs state that all liens for attorney's fees and

expenses be and hereby are expressly waived in this matter.

APPROVED AND ACKNOWLEDGED:

Dated: 4-28-98 /s/ Kyong Ju Barnett
Kyong Ju Barnett, guardian ad litem, next friend and duly appointed co-conservator for Mia Kyong Barnett, a minor

Dated: 4-28-98 /s/ Gary C. Robb
Gary C. Robb for himself and on behalf of Robb & Robb LLC

Dated: 4-28-98 /s/ Anita Porte Robb
Anita Porte Robb for herself and on behalf of Robb & Robb LLC

ATTORNEYS FOR PLAINTIFF KYONG JU BARNETT, guardian ad litem, next friend and duly appointed conservator, Mia Kyong Barnett, a minor

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Kyong Ju Barnett, in her capacity as guardian ad litem, next friend, and duly appointed co-conservator of Mia Kyong Barnett, a minor, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Gary C. Robb, to me personally known, who being by me duly sworn, did say that he has read the foregoing Acknowledgement of Satisfaction of Judgment and Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that he has signed the same as his free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

On this 28 day of April, 1998, before me, appeared Anita P. Robb, to me personally known, who being by me duly sworn, did say that she has read the foregoing Acknowledgement of Satisfaction of Judgment and

Waiver of Attorney's Liens, that the facts set forth therein are true and correct and that she has signed the same as her free act and will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at my office the day and year last above written.

/s/ Teresa A. Shell
Notary Public

My Commission Expires:

TERESA A. SHELL
Notary Public – Notary Seal
STATE OF MISSOURI
Platte County
My Commission Expires: April 9, 2000

APPENDIX B

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 8
HONORABLE LEE E. WELLS, JUDGE

KYONG JU BARNETT, et al., Plaintiffs,	)	
vs.	)	No. CV93-24644
TURBOMECA ENGINE CORPORATION, et al., Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

On Tuesday, the 28th day of April, 1998, the above-entitled cause came on regularly for hearing before the Honorable Lee E. Wells, Judge of Division 8 of the Sixteenth Judicial Circuit, at Kansas City.

APPEARANCES

Mr. Gary C. Robb
Ms. Anita Porte Robb
Robb & Robb, L.L.C.
Attorneys at Law
3900 One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Attorneys for plaintiffs
Kyong Ju, Jesse, and Mia
Barnett

Mr. Craig S. O'Dear
Mr. Nicholas L. DiVita
Bryan Cave, L.L.P.
Attorneys at Law
Suite 3500
1200 Main Street
Kansas City, Missouri 64105
Attorneys for defendants

Katherine A. Calvert, Certified Court Reporter #304
Official Court Reporter, Division 8
Sixteenth Judicial Circuit at Kansas City

APPEARANCES
(Continued)

Mr. John J. Williams, III
Slagle, Bernard & Gorman, P.C.
Attorney at Law
600 Plaza West Building
4600 Madison
Kansas City, Missouri 64112
and
Mr. Duke W. Ponick, Jr.
Attorney at Law
1100 Main Street
Kansas City, Missouri 64105
Attorneys for plaintiffs
James and Wanda Barnett

Mr. Edward F. Downey
Mr. Douglas E. Nelson
Office of Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102

APRIL 28, 1998

[p. 3] THE COURT: Good afternoon, everybody.

MR. ROBB: Good afternoon, Your Honor.

THE COURT: We have this afternoon a proposed final judgment for presentation to the court in the matter of Barnett vs. Turbomeca, et al.

Are the parties ready to proceed?

MR. ROBB: We are ready to proceed on behalf of plaintiff.

MR. O'DEAR: We are ready to proceed on behalf of Turbomeca.

THE COURT: Mr. Williams.

MR. WILLIAMS: Of behalf of Jim and Wanda Barnett, we are ready.

THE COURT: And the attorney general?

MR. NELSON: On behalf of the State of Missouri, we are ready.

THE COURT: Mr. Robb, you may proceed.

MR. ROBB: May it please the court.

We have, immediately before this proceeding in open court, presented Your Honor with a copy of a proposed final judgment for execution upon a judgment for these plaintiffs and each of them in the total amount of $40,554,745 and no cents.

We believe that the proposed final judgment is a [p. 4] combination of various agreements made between and

among the parties over the course of the last two weeks, and that it also reflects all of the parties' and their counsels' respective understanding as to what the court's rulings have been concerning disputed issues.

I have also before this hearing caused to be circulated among all counsel of record a copy of the original, which the court holds, and at this time we would like to go around counsel to indicate – and I would like to indicate on behalf of plaintiffs, Kyong Ju Barnett, Jesse Barnett, and Mia Barnett, that we do believe that the final judgment is in accordance with agreements made between and among the parties or reflects rulings of this court, and we would like an announcement on the record with respect to other counsel.

MR. O'DEAR: Judge, on behalf of the Turbomeca defendants, we do acknowledge that this final judgment is in order, which is consistent with the court's rulings on these various matters.

MR. WILLIAMS: Your Honor, on behalf of Jim and Wanda Barnett, I too agree with the matters set forth in the judgment with one proviso, maybe a couple of provisos, that being that the judgment recites that [p. 5] we have withdrawn our motion to dismiss the State and our motion regarding the denomination of damages for aggravating circumstances as punitive damages.

We are withdrawing that motion upon the agreement of the State – or our understanding is the State has agreed not to appeal or seek any type of appellate relief with regard to this judgment, and so we withdraw that motion based upon that understanding; and that upon our understanding, that we would have the right to reassert

those grounds set forth in the motion in the event – in the very unlikely event we believe something should happen and this judgment should be set aside.

MR. DOWNEY: Your Honor, on behalf of the State, I would agree that this proposed order accurately represents what Your Honor indicated he would rule yesterday, and the State of Missouri is prepared to live with Your Honor's ruling, if that answers Mr. Williams' questions.

MR. ROBB: If I may proceed, Your Honor. So that we do not lose sight of what we're really about here today, the family has asked that we make a request of the court for a very brief moment of silence to honor the deceased, Jim Barnett, Jr., with the court's permission.

[p. 6] THE COURT: Permission is granted.

MR. ROBB: Thank you, Your Honor.

(Moment of silence.)

MR. ROBB: Your Honor, at this time we would ask that counsel for the Turbomeca defendants here with tender for the review and examination of the representative of the Commerce Bank the instruments which they seek to satisfy this judgment.

THE COURT: You may.

MR. ROBB: Mr. Simpson, would you identify yourself for the court.

MR. SIMPSON: Jerry Simpson, officer with Commerce Bank.

MR. ROBB: May he come to this side of the bar, Your Honor?

THE COURT: He may.

MR. O'DEAR: Sir, if you could come up front, please.

MR. ROBB: Your Honor, we ask Mr. O'Dear read the amounts into the record.

MR. O'DEAR: First of all, with regard to the payment to Kyong Ju Barnett, Jesse Barnett, and Robb & Robb, L.L.C., that total payment is $22,657,073. Nations Bank advises us that they are not able to do a cashier's check above seven figures, so we have three [p. 7] checks.

We have the first check from Nations Bank, Cashier's Check No. 2189584 in the amount of $9 million. We have check – these are all Nations Bank cashier's checks – a Check No. 2189585 also in the amount of $9 million. We have Check No. 2189587 in the amount of $4,657,073. Again, those three checks totaling $22,657,073.

The next payment tendered is to Kyong Ju Barnett, as next friend for Mia Barnett, and Robb & Robb, L.L.C. That is Check No. 2189580 in the amount of $7,552,356.

The next payment is to the parents, James Barnett, Sr. and Wanda Barnett, and their attorneys, Slagle, Bernard & Gorman, P.C. and Duke Ponick, Jr. That's Check No. 2189581 in the amount of $5,603,117.

And then the final check is to the State of Missouri, Check No. 2189582 in the amount of $4,742,199.

MR. ROBB: Your Honor, first, on behalf of our clients, Kyong Ju Barnett and Jesse Barnett, we acknowledge the tender of the checks totaling $22,657,073, and we seek permission of the court to present these to Mrs. Barnett at this time.

THE COURT: You may.

[p. 8] MR ROBB: Mrs. Barnett, would you stand up for a moment, and would you say your full name.

MRS. BARNETT: Kyong Ju Barnett.

MR. ROBB: And do you acknowledge receipt of these three checks with respect to this matter in the total of $22,657,073?

MRS. BARNETT: Yes.

MR. ROBB: Your Honor, we would ask that we be able to receive tender of the funds on behalf of Kyong Ju Barnett as next friend for the minor child, Mia Barnett.

THE COURT: All right.

MR. O'DEAR: That is Check No. 2189580 in the amount of $7,552,356.

MR. ROBB: Mrs. Barnett, in your capacity as the next friend for Mia Barnett, do you acknowledge receipt of the funds to satisfy the judgment on her behalf in the amount of $7,552,356?

MRS. BARNETT: Yes.

MR. ROBB: You may be seated now.

MR. O'DEAR: Your Honor, at this time we would ask that Mr. Robb and his clients sign the acknowledgments of satisfaction of judgments, which we have provided to them.

MR. ROBB: We agree to do so, Your Honor.

[p. 9] Your Honor, we've now signed and executed and are in the process of notarizing the acknowledgments.

At this time we would like to present to counsel for the defendants a fully executed and signed acknowledgment of satisfaction of judgment and waiver of attorneys' liens signed by Mrs. Barnett on behalf of minor child, Mia Barnett, and myself, and my law partner on behalf of our law firm, Your Honor.

MR. O'DEAR: We acknowledge receipt of this document.

MR. ROBB: Also on behalf of Mrs. Kyong Ju Barnett, her son, Jesse Barnett, myself, and my law partner, Anita Robb, for our law firm, we present to counsel for defendant Turbomeca the acknowledgement of satisfaction of judgment and waiver of attorneys' liens, Your Honor.

MR. O'DEAR: Again, we acknowledge receipt of this document as well.

MR. WILLIAMS: If you will, we'll dispense with this ceremony of doing it in this fashion. I think Mr. and Mrs. Barnett are keeping in mind the reason that we're here in the first place was occasioned by the death of their son. They have executed the acknowledgment,

and I think we can handle this in the routine fashion as far as exchanging the [p. 10] checks.

THE COURT: You want the acknowledgement on the record of course?

MR. O'DEAR: Yes.

Your Honor, at this time the Turbomeca defendants would tender to Mr. Williams and Mr. Ponick on behalf of their clients, James Barnett, Sr. and Wanda Barnett, a check for $5,603,117, Check No. 2189581.

We also acknowledge on the record the receipt of an acknowledgment of satisfaction of judgment and waiver of attorneys' liens signed by James Barnett, Sr. and Wanda L. Barnett, Duke Ponick, Jr., and John Williams for himself, and Slagle, Bernard & Gorman, L.L.C. Is that correct, Mr. Williams?

MR. WILLIAMS: That's right. It's a professional association but I think we've done all right.

MR. O'DEAR: Your Honor, the last check that we have is to the State of Missouri.

Whoever is going to accept this on behalf of the State of Missouri, could you identify yourself?

MR. NELSON: Douglas E. Nelson for the State of Missouri, Your Honor.

Teresa, if you would be so kind to notarize ours, I would appreciate it.

[p. 11] MR. O'DEAR: Mr. Nelson, if I could, I know you're an officer of the court, so I won't put you

under oath, but I have a few questions. I want to tie up the authority issue.

You've stated that your name is Douglas E. Nelson; is that correct?

MR. NELSON: That is correct.

MR. O'DEAR: Your position is what?

MR. NELSON: I'm assistant attorney general with the State of Missouri.

MR. O'DEAR: And you then work for the attorney general, Mr. Nixon?

MR. NELSON: That's correct.

MR. O'DEAR: Are you authorized by the attorney general of the State of Missouri to represent the interest of the State of Missouri in this matter?

MR. NELSON: Yes, I have been

Your Honor, I kind of feel like I'm under oath. As an officer of the court, I've been authorized, along with Mr. Downey, to sign the acknowledgment and satisfaction and accept the check for the State of Missouri.

I kind of feel like I am on the witness stand, although I'm not on the stand. I made that acknowledgment to Mr. O'Dear that we have the [p. 12] authorization of our office to sign this and accept that check on behalf of the State.

MR. O'DEAR: That's what I wanted to confirm.

And would you identify your partner here, Mr. Downing?

MR. NELSON: Edward F. Downing

MR. O'DEAR: His position is?

MR. NELSON: Also assistant attorney general for the State of Missouri.

MR. O'DEAR: He's also authorized by the attorney general of the State of Missouri to represent the State's interest in this matter?

MR. NELSON: That's correct.

MR. O'DEAR: You understand that we are tendering to the State of Missouri a cashier's check in the amount of $4,742,199, which is Check No. 2189582 in full and final satisfaction of any interest the State has or may have in this matter; is that correct?

MR. NELSON: That is correct.

MR. O'DEAR: You are accepting that on that basis?

MR. NELSON: Yes, I am.

MR. O'DEAR: We acknowledge on the record receipt of the acknowledgment of satisfaction of judgment and waiver of attorneys' liens signed by the [p. 13] State of Missouri by Douglas E. Nelson, assistant attorney general of Missouri.

MR. ROBB: We have a couple other matters. One with respect to the appeal bond. We acknowledge receipt of the motion by counsel for Turbomeca to release the appeal bond.

What we have offered to do is immediately when the officers of the Commerce Bank notify my office that the

funds have cleared and on deposit in our firm's trust account, we will immediately cause the phone call to be made to Mr. O'Dear informing him of that, and we'll also advise the court, and we ask that this court not sign the order releasing the appeal bond until those phone calls are made, Your honor.

THE COURT: I will issue the order relinquishing the appeal bond when I have been advised to do so by Mr. O'Dear, who is the attorney for the defendants, and I'll accept your word on that.

MR. O'DEAR: Okay.

MR. WILLIAMS: I take it you are waiting until all the checks have cleared?

THE COURT: Yes, until all checks have been cleared.

MR. DiVITA: Your Honor, may we present the order to the court?

[p. 14] THE COURT: Yes.

MR. ROBB: Another administrative matter. We ask counsel for defendant to supply us with a copy of the executed satisfactions of judgment.

MR. O'DEAR: We would be happy to do so, and we'll make copies as soon as the hearing is over.

I would like to say too for the record, I'm presuming everybody is going to go to the bank this afternoon. There shouldn't be any reason why anybody doesn't have the money by this afternoon.

MR. ROBB: On behalf of our client, that's our intention, Your Honor.

MR. WILLIAMS: We are too, but I'm unfamiliar with the banking rules for clearing these checks.

MR. O'DEAR: All right.

MR. ROBB: Your Honor, on behalf of our clients, Kyong Ju, Jesse, and Mia Barnett, we ask this court to sign the final judgment indicating that there has been satisfaction of that judgment in full, and then release and discharge the defendants other than the payment of court costs as reflected in the document.

THE COURT: Judgment has been executed and the costs will be taken care of by the cost department.

MR. WILLIAMS: Your Honor, if I may, I take it [p. 15] the defendants have approved the form and content of the satisfaction of judgment since you supplied it to us; is that correct?

MR. O'DEAR: Oh, yes. Yes.

THE COURT: Are you going to file those with the court?

MR. O'DEAR: Yes.

THE COURT: I want to thank everybody for the cooperation that's been shown in obtaining a final closure on this matter. It's been exceptional and I've appreciated all of the help that was received from all sides, and I'm delighted we're finally able to conclude the matter.

Thank you.

We'll be in recess.

(Adjournment.)